United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76 - 1324

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

UNITED STATES OF AMERICA,

Appellee,

- against -

JACK G. SCHWARTZ and GEORGE SARKIS, a/k/a "George,"

Defendants-Appellants

On Appeal from Judgment of the
United States District Court for
the Eastern District of New York

PETITION FOR REHEARING FOR APPELLANT SCHWARTZ

Saxe, Bacon & Bolan, P.C.
Attorneys for Appellant
Jack G. Schwartz
39 East 68th Street
New York, New York 10021
(212) 472-1400

ROY M. COHN
MICHAEL ROSEN
RONALD F. POEPPLEIN

Of Counsel

PRELIMINARY STATEMENT

This petition is submitted on behalf of the appellant Jack G. Schwartz (hereinafter sometimes referred to as "Schwartz") for a rehearing of his appeal from a judgment of conviction in the Eastern District of New York. It is respectfully requested that a rehearing be directed in banc, and that the United States Attorney be directed to file an answer to this petition.

It is respectfully submitted that the opinion of this Court dated January 25, 1977 is in error, as will be set forth below. We will not seek to burden this Court with a recapitulation of the facts which are set forth in Schwartz's brief on file with this Court.

ARGUMENT

The Court determined that Schwartz was convicted of violating 18 U.S.C. §894 specifically as an aider and abettor under 18 U.S.C. §2. The Court's original decision determined that the jury had not reached inconsistent verdicts and that, even if they had, the verdict would not be disturbed on appeal.

It is evident from the opinion that the Court concluded that George Sarkis, Schwartz's co-defendant, was convicted as a principal. Based on this Court's view of the evidence, if Schwartz was held in as a guilty party, there had to be a conspiracy between Schwartz and Sarkis to threaten

Fred McGhee in order to collect funds. Moreover, there had to be the completion of the criminal act to hold Schwartz in under §2 and thus the activities had gone beyond the conspiracy stage. When this factor is coupled with the disjunctive nature of the conspiracy charge (p. 22 of Schwartz's brief), there is no distinction in this case between conspiracy and aiding and abetting. The crime had been completed. Once this determination was reached, either Schwartz was guilty of both conspiracy and aiding and abetting or he was innocent of both charges. As the jury acquitted him of the conspiracy charge, the only logical conclusion is that they should have acquitted on all counts.

The Court points out that even if it concluded that the verdicts were inconsistent, the conviction on the aiding and abetting would not be disturbed. The basis for this is the half-century old case of Steckler v. United States, 7 F.2d 59 (2nd Cir., 1925). The basic tenor of this case would seem to be that if the jury suspects that a defendant is guilty, although the requisite level of proof beyond a reasonable doubt has not been reached, they may return a verdict of guilty on select counts of the indictment, and acquit on others. The basic fallacy of this argument is that it does no more than carry forward the commonly held notion that if a man is indicted, he must be guilty of something. It permits juries to speculate far beyond their proper functions. If a man is guilty, let him be convicted.

However, if he is innocent, appellate courts should not permit juries to assume authority which they do not rightly possess, even if a jury's verdict is brought into question. The penalties of a felony conviction is simply too severe to permit such occurrances.

On the use of the word "Mafia" by the prosecutor, we submit that this point and this point alone merits reversal. The Court states that the instant situation is distinguishable from United States v. Love, 534 F.2d 87 (6th Cir. 1976). A close and careful reading of Love indicates that this is not the case. In Love, the prosecutor specifically discounted any connection between Love's company and the Mafia. This, however, was enough to merit a reversal of Love's conviction. Similarly, the prosecutor in the instant case discounted any connection between Schwartz and the Mafia. In Love, it was merely the implementation of the word which warranted the reversal. The Six Circuit did not consider the context in which the word was employed, nor should this Court consider who called a particular witness or who introduced a specific tape into evidence. The word itself, under the Love theory, is enough to pervade the entire proceeding. There was no "implicit, unfounded allegation" that Love or his company was a member of the Mafia. We once again submit that the similarities between Love and the instant appeal are so striking as to mandate a reversal.

As pointed out in our initial brief (page 18, foot note), the error of the prosecutor in Love was considered so serious as to eventually result in a dismissal of the indictment. This Court should at least afford the appellant the opportunity of a fair trial without the shadow or organized crime hanging over it.

We would once again renew our objection to the sufficiency of the evidence as set forth in our initial brief. However, it must be pointed out that the Court has incorrectly stated one important fact. This Court found that:

> "Though Sarkis' employ for Schwartz was only of a few days' duration, Sarkis was paid about a thousand dollars for his service."

This would lead to the inference that Schwartz had paid money to Sarkis. However, the record clearly indicates that Schwartz at no time had given Sarkis any money. The only money received by Sarkis was from Jack Cohen. As the evidence unquestionably revealed, this was nothing new for Cohen, who often gave sums of money to Sarkis. Unless Sarkis was actually being paid by Schwartz, it would seem unlikely that he would contemplate the commission of a federal crime on Schwartz's behalf.

In summary, it can be said that neither the evidence, the law nor the proceedings at trial merit an affirmance of Schwartz's conviction. It is thus prayed that the Court grant rehearing (in banc) and reverse appellant's conviction.

CONCLUSION

For the aforementioned reasons it is respectfully requested that this petition be granted.

Dated: New York, New York
February 8, 1977

Yours, etc.,
Saxe, Bacon & Bolan, P.C.
SAXE, BACON & BOLAN, P.C.
Attorneys for Appellant
Jack G. Schwartz
39 East 68th Street
New York, New York 10021
(212) 472-1400

ROY M. COHN
MICHAEL ROSEN
RONALD F. POEPPLEIN

Of Counsel

U.S. ATTORNEY

FEB 8 4 45 PM '77

EAST. DIST. N.Y.